

155 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Southline Transmission, L.L.C.
SU FERC, L.L.C.

Docket No. EL15-65-001

ORDER GRANTING CLARIFICATION, IN PART, AND DENYING REHEARING

(Issued May 5, 2016)

1. Arizona Electric Power Cooperative, Inc. and Southwest Transmission Cooperative (collectively, the Cooperatives) request clarification or, in the alternative, rehearing of an order issued on September 17, 2015¹ in which the Commission: (1) found that Southline Transmission, L.L.C. (Southline Transmission) is a passive entity and therefore not a public utility under the Federal Power Act (FPA) or an electric utility company under the Public Utility Holding Company Act of 2005; (2) granted SU FERC, L.L.C. (SU FERC, and together with Southline Transmission, Applicants) negotiated rate authority for service on a merchant transmission project (Southline Project) proposed by Applicants; (3) approved SU FERC's capacity allocation methodology; and (4) granted certain waivers of Commission regulations. In this order, we grant the Cooperatives' request for clarification, in part, and deny rehearing.

I. Background

2. As discussed in the September Order, the Southline Project would consist of a new build section and an upgrade section.² The new build section would include approximately 240 miles of new 345 kV double-circuit electric transmission lines and related facilities located in New Mexico and Arizona, and it would provide approximately 1,000 MW of bi-directional capacity. The upgrade section would rebuild

¹ *Southline Transmission, L.L.C.*, 152 FERC ¶ 61,211 (2015) (September Order).

² This introductory background information is limited to matters relevant to the Cooperatives' request for clarification or rehearing. A full description of all aspects of Applicants' petition for declaratory order is set forth in the September Order.

and convert approximately 120 miles of Western Area Power Administration's (Western) Saguaro-Tucson and Tucson-Apache 115 kV transmission lines to double-circuit 230 kV lines and would also include certain minor expansions of the existing Western 115 kV system.³

3. Applicants indicated that Western is considering participation in the Southline Project, and that under a contemplated public-private partnership, Southline Transmission and Western would contribute certain resources and would obtain capacity rights on the Southline Project commensurate with those contributions. Southline Transmission would fund the costs of all new construction, improvements to existing transmission lines and related facilities, and the acquisition of any needed real property interests. Western would acquire capacity rights on the upgrade section (in addition to its existing capacity) and would acquire capacity rights on the new build section in amounts that correspond to Western's contributions.⁴

4. Southline Transmission proposed to acquire and lease to SU FERC, through a real estate investment trust (REIT), certain Southline Project physical transmission system assets and the associated capacity rights. In addition, Southline Transmission would transfer to SU FERC any other capacity rights not associated with the leased Southline Project assets. Upon completion of construction, Western and SU FERC would operate and maintain the upgrade and new build sections, respectively. Legal title to various Southline Project facilities would be held separately by Western and Southline Transmission, with Western holding title to the upgrade section and the Southline Transmission REIT holding legal title to, or a leasehold interest in, facilities and other assets related to the new build section and capacity rights commensurate with its contributions to the Southline Project. SU FERC would have the exclusive right to use the facilities owned by the REIT, as well as responsibility for operation and maintenance of the new build section and compliance with all regulatory and reliability requirements. Western would not be part of the REIT structure and would operate and maintain the upgrade section, and administer all of its capacity rights on the project using its existing non-jurisdictional open access transmission tariff (OATT).⁵

5. In the September Order, the Commission, among other things, granted to SU FERC authority to charge negotiated rates for transmission service rights related to its interest in the Southline Project and authority to allocate up to 100 percent of its capacity rights through bilateral negotiations concerning key rates, terms and conditions. The

³ *Id.* P 4.

⁴ *Id.* PP 5-6.

⁵ *Id.* PP 8-10.

Commission also approved the capacity allocation process proposed in Applicants' petition. As described in the September Order, the transmission service rights related to SU FERC's interest in the Southline Project consist of the capacity rights on both the new build and the upgrade sections of the Southline Project commensurate with Southline Transmission's contribution to those sections.⁶

II. Request for Clarification or Rehearing

6. The Cooperatives state in their request for clarification that they do not contest the Commission's determination that Applicants met the standard to charge negotiated rates on the new build section of the Southline Project, but they also state that the Commission should clarify that this conclusion does not apply to the upgrade section.⁷ They note that the Commission pointed out in the September Order that SU FERC will operate and maintain the new build section of the Southline Project, and Western customers utilizing that section will be served at cost-of-service rates under Western's OATT.⁸ The Cooperatives go on to state that "the Commission should have explained that while SU FERC may have capacity rights on the [u]pgrade section of the Southline project, the captive customers of the [u]pgrade section will continue to receive cost-of-service rates pursuant to Western's OATT."⁹

7. The Cooperatives state that they will be captive customers on the upgrade section of the Southline Project, and they assert that "[w]hile the Commission indicates that Western's cost-of-service rates will prevail for service over the capacity of the [u]pgrade section not otherwise owned by Southline, Western must retain all authority to dictate the cost recovery of those facilities."¹⁰ The Cooperatives assert that "[i]n the absence of such

⁶ *Id.* PP 7-8, 10, 72.

⁷ Cooperatives Request for Clarification or Rehearing at 4-5.

⁸ The Cooperatives assert that this statement assumes that Western has already committed to being a customer of the new build section, which, according to the Cooperatives appears to conflict with several conclusions reached in the September Order including the fundamental principle that SU FERC will conduct an open season for capacity on the Southline Project. The Cooperatives also state that Western's OATT would apply on the new build section only if Western has already purchased capacity rights on the new build section, and nothing before the Commission at this time would support this conclusion. *Id.* at 5, n14.

⁹ *Id.* (emphasis in the original).

¹⁰ *Id.* at 5-6.

authority, a third-party developer could rely on the captive customer base of existing Western customers to support the development of a merchant transmission project, and “[t]his approach would violate the fundamental principle that merchant developers assume all financial responsibility of a project”¹¹

8. The Cooperatives state that they seek rehearing “[t]o the extent that the Commission does not provide the clarification requested”¹² They describe the issue presented on rehearing as “[w]hether the Commission should reverse its determination that SU FERC will have negotiated rate authority for transmission service rights over the portions of the Southline Transmission Project that are part of Western’s transmission system.”¹³ The Cooperatives argue that “[t]he Commission erred in granting SU FERC negotiated rate authority over Western’s transmission facilities that are a part of the Southline Project [i.e., the upgrade section] because “[t]he Commission’s authority over rates for service on Western’s transmission facilities is limited,” and its grant of negotiated rate authority to SU FERC is inconsistent with those limits, as set forth in Department of Energy Delegation Order No. 00-037.00A (Delegation Order).¹⁴

9. The Cooperatives state that under the Delegation Order, Commission review of Western’s rates is limited to: (1) whether the rates are the lowest possible to customers consistent with sound business principles; (2) whether the revenue levels generated by the rates are sufficient to recover the costs of producing and transmitting the electric energy; and (3) the assumptions and projections used in developing the rate components that are subject to Commission review.¹⁵ The Cooperatives maintain that “[t]he Commission’s determination in the [September] Order that SU FERC will have negotiated rate authority for transmission service rights on the Southline Project is an unlawful extension of the Commission’s limited authority over Western’s transmission rates.” They argue that “[i]n particular, the Commission has no authority under the delegation order to grant any entity ratemaking authority over Western’s transmission facilities.”¹⁶

¹¹ *Id.* at 6.

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 8.

10. Finally, the Cooperatives maintain that the Commission erred in determining that SU FERC will have negotiated rate authority over the new build section of the Southline Project “to the extent it becomes part of Western’s Parker-David transmission system.”¹⁷

III. Discussion

11. We grant clarification, in part, to address the Cooperatives’ stated concern, i.e., their potential exposure to cost recovery on the upgrade section of the Southline Project by a party other than Western, specifically, by SU FERC. However, we cannot grant their request for clarification in full. Therefore, because the Cooperatives seek rehearing “[t]o the extent that the Commission does not provide the clarification requested,”¹⁸ we deny rehearing on those matters on which we cannot grant clarification.

12. The Cooperatives’ request for clarification consists of two distinct, but interrelated, elements. First, the Cooperatives request that the Commission clarify that nothing in the September Order grants SU FERC the authority to dictate cost recovery on the upgrade section of the Southline Project that remains within Western’s purview. Second, they request that the Commission clarify that while Applicants met the criteria for negotiated authority for service on the new build section of the Southline Project, Applicants did not do so for the upgrade section. We can provide the first clarification, but we cannot provide the second because Applicants did satisfy the criteria necessary for authority to sell at negotiated rates the capacity rights that Southline Transmission acquires on the upgrade section of the Southline Project.

13. The September Order makes clear that “SU FERC will have neither authority over Western nor an ability to control Western that would allow SU FERC to recover costs from Western [transmission] customers.”¹⁹ Moreover, as the Commission noted in the September Order, Applicants stated that “Western . . . would operate and maintain the upgrade section, and administer all of [Western’s] capacity rights on the project using [Western’s] existing non-jurisdictional open access transmission tariff.”²⁰ This latter

¹⁷ *Id.* at 7-8. The Cooperatives are customers of Western over the Parker-Davis Project transmission facilities that interconnect Arizona Electric Power Cooperative, Inc.’s Apache Generating Station at its southeastern terminus with the loads of an Arizona Electric Power Cooperative, Inc. Class A member in the vicinity of its northwestern terminus at Mead substation. *See* Cooperatives Protest, Docket No. EL15-65-000, at 3 (filed June 6, 2015).

¹⁸ Cooperatives Request for Clarification or Rehearing at 7.

¹⁹ September Order, 152 FERC ¶ 61,211 at P 49.

²⁰ *Id.* P 10 (citing Applicants Petition at 2, 8-9).

statement constitutes one of the premises underlying the declaratory relief that the Commission granted in the September Order. And, as noted in that order, Applicants have previously acknowledged that “[s]hould the final arrangements between Applicants and Western materially differ from those outlined in the Petition, Applicants would not be able to rely upon any resulting declaratory order.”²¹ This is an essential feature of declaratory relief, i.e., it is based on representations made to the Commission in an applicants’ petition. Finally, Applicants affirmed in their answer to the Cooperatives during the earlier phase of this proceeding that “the Southline Transmission costs would not be included in rates under the Western OATT.”²² For these reasons, the September Order and the underlying record in this proceeding clearly establish that the captive customers of the upgrade section of the Southline Project, i.e., Western’s transmission customers, including the Cooperatives, will continue to be charged cost-of-service rates pursuant to Western’s OATT.

14. SU FERC’s negotiated rate authority, in contrast, only allows it to receive payment for transmission services it provides, or for capacity rights it sells, from parties that have agreed to acquire such services or rights from SU FERC. Thus, under Applicants’ proposal, these parties would not include Western’s transmission customers, who will continue to be served under Western’s OATT.

15. Accordingly, we clarify that nothing in the September Order grants SU FERC the authority to dictate cost recovery on the upgrade section of the Southline Project or to recover costs from Western transmission customers. However, the Cooperatives do not explain in their request for clarification why the Commission should also clarify that while Applicants satisfied the criteria for negotiated authority for service on the new build section of the Southline Project, they did not satisfy these criteria for the upgrade section. The Cooperatives state that if Western does not retain all authority to dictate cost

²¹ Applicants Answer, Docket No. EL15-65-000, at 8 (filed June 23, 2015) (noting that “[t]he Commission issues declaratory orders based on the facts and circumstances presented in the application,” and citing *Nevada Power Co.*, 133 FERC ¶ 61,166, at P 35 (2010)).

This point is relevant to the Cooperatives’ observation that the September Order makes assumptions about Western’s participation in the Southline Project that have not yet materialized. *See supra* note 8. As discussed in the text of this order, these assumptions are a premise of the declaratory relief granted in the September Order, and Applicants may not be able to rely on that order to the extent that the actual development of the Southline Project differs materially from the proposal Applicants presented in their petition.

²² Applicants Answer, Docket No. EL15-65-000, at 4 (filed June 23, 2015).

recovery for the upgrade section “a third-party developer could rely on the captive customer base of existing Western customers to support the development of a merchant transmission project.”²³ But nothing in the September Order diminishes or compromises Western’s authority to recover costs associated with the upgrade section, and nothing in it allows a third-party developer to rely on Western’s captive customer base to develop a merchant transmission project.

16. As explained in the September Order, to approve negotiated rates for a merchant transmission project, the Commission must ensure that the resulting rates for transmission are just and reasonable. Thus, the Commission undertakes an analysis to determine, among other things, that the merchant transmission owner has assumed the full market risk for the cost of constructing its proposed transmission project. Additionally, the Commission must determine whether the project is being built within the footprint of the merchant transmission owner’s (or an affiliate’s) traditionally regulated transmission system. If it is, the Commission must determine that there are no captive customers who would be required to pay the costs of the project. The Commission also considers whether the merchant transmission owner or an affiliate already owns transmission facilities in the particular region where the project is to be located, what alternatives customers have, whether the merchant transmission owner is capable of erecting any barriers to entry among competitors, and whether the merchant transmission owner would have any incentive to withhold capacity.²⁴

17. The Commission found in the September Order that Applicants had made representations in their petition that satisfied these requirements.²⁵ These findings apply to the rates for transmission service that SU FERC provides on the new build section of the Southline Project and to transmission rates resulting from sales by SU FERC of capacity rights on the upgrade section that Applicants acquire from Western. SU FERC’s negotiated rate authority for sales of its capacity rights on the upgrade section does not compromise Western’s authority or expose Western’s captive customers to cost recovery by SU FERC as the third-party developer. SU FERC’s authority is limited to transactions between SU FERC and parties that agree, through negotiation, to purchase the capacity rights SU FERC holds. We therefore cannot grant the Cooperatives’ request for this additional clarification, and since the Cooperatives seek rehearing to the extent that we cannot grant clarification, we turn to their rehearing request.

²³ Cooperatives Request for Clarification or Rehearing at 6.

²⁴ September Order, 152 FERC ¶ 61,211 at P 41.

²⁵ *Id.* PP 45, 63, 67, 70.

18. The Cooperatives argue on rehearing that granting SU FERC negotiated rate authority for capacity rights on the upgrade section of the Southline Project violates provisions of Department of Energy Delegation Order No. 00-037.00A (Delegation Order). Specifically, they argue that “[t]he Commission’s determination in the [September] Order that SU FERC will have negotiated rate authority for transmission service rights on the Southline Project is an unlawful extension of the Commission’s limited authority over Western’s transmission rates.”²⁶ The Cooperatives also maintain that “the Commission has no authority under the [Delegation Order] to grant any entity ratemaking authority over Western’s transmission facilities that are included in the Upgrade portion of the Southline Project.”²⁷

19. We disagree that the Delegation Order prevents us from granting SU FERC authority to sell at negotiated rates the capacity rights that it acquires on the upgrade section of the Southline Project. In the Delegation Order, the Secretary of Energy delegates to Western “the authority to develop power and transmission rates” for its “power marketing administration.”²⁸ The Secretary of Energy delegates to the Commission “authority to confirm, approve, and place into effect . . . rates developed by” Western.²⁹ The Delegation Order does not prevent Western from partnering with Applicants to develop the Southline Project or from agreeing as part of that venture that a public utility subject to Commission jurisdiction could acquire from Western capacity rights on the portion of the Southline Project owned by Western. The rates at which SU FERC agrees, in turn, through negotiation, to sell those capacity rights to third parties are not rates developed by Western for service provided by Western. They are rates at which a public utility subject to our jurisdiction has agreed to sell transmission capacity rights to willing customers. These latter transactions fall outside the scope of Western’s authority, and they require Commission approval under the FPA before the public utility can engage in them.

20. For this reason, SU FERC’s negotiated rates fall outside the scope of the Delegation Order and instead fall within the Commission’s jurisdiction under the FPA. In addition, our grant of negotiated rate authority to SU FERC for these transmission capacity rights does not, as the Cooperatives assert, constitute a grant of “ratemaking authority over Western’s transmission facilities.” Under the arrangement that Applicants describe in their Petition, Western would agree that Applicants could acquire capacity

²⁶ Cooperatives Request for Clarification or Rehearing at 8.

²⁷ *Id.*

²⁸ Delegation Order § 1.1.

²⁹ *Id.* § 1.3.

rights on the upgrade section of the Southline Project (which would be owned by Western) commensurate with their contribution to that section of the project. SU FERC's authority, in turn, to sell those capacity rights at negotiated rates does not give SU FERC any authority over the underlying transmission facilities. SU FERC's authority, rather, would be limited to sales of the capacity rights that it acquires, and this authority does not include any further ratemaking authority that involves recovery of the costs of facilities owned by Western when the capacity rights have not been sold by Western, or that permits SU FERC to receive payments from parties that have not agreed to them. For this reason the phrase "ratemaking authority over Western's transmission facilities" does not accurately describe the authority that the Commission granted in the September Order.

21. Similar considerations apply to the Cooperatives' assertion that the Commission erred in determining that SU FERC will have negotiated rate authority over the new build section of the Southline Project, which will be owned by Southline Transmission, to the extent the new build section becomes part of Western's Parker-Davis transmission system. The record in this proceeding provides no basis to conclude that the new build section of the Southline Project will become part of Western's Parker-Davis transmission system.

22. As the Applicants explained in the earlier phase of this proceeding, Western has sought input from Parker-Davis transmission system stakeholders concerning the possibility of incorporating new build section *capacity*, i.e., capacity rights that Western acquires on the new build section, into the Parker-Davis transmission system.³⁰ Western's proposal to utilize this capacity for the benefit of Western customers that utilize the Parker-Davis system does not make the new build section of the Southline Project a part of the Parker-Davis system.

23. As noted above, the new build section consists of an approximately 240 miles of new 345 kV double-circuit electric transmission lines and related facilities located in New Mexico and Arizona. It would not include, or be included in, the Parker-Davis transmission system. It is thus incorrect to state that the Commission made any determinations regarding SU FERC's negotiated rate authority under circumstances in which the new build section becomes part of Western's Parker-Davis transmission system.

³⁰ Applicants Answer, Docket No. EL15-65-000, at 4 (filed July 17, 2015); *see also* Cooperatives Answer, Docket No. EL15-65-000 at Attachment A, Question 9 (filed July 2, 2015).

24. Nevertheless, we clarify that any capacity that Western acquires on the new build section for the benefit of Western customers dependent on the Parker-Davis system would necessarily not be available to SU FERC to sell at negotiated rates. SU FERC's ability in practice to utilize its negotiated rate authority for services on the new build section would thus be restricted to the extent that Western holds that capacity, or any other capacity, on the new build section. As stated in Applicants' petition, all capacity that Western acquires would be sold under Western's OATT, not pursuant to SU FERC's negotiated rate authority.³¹

The Commission orders:

The Cooperatives' request for clarification is hereby granted, in part, and their request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³¹ Applicants Petition at 9.